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Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

HOWE SCALE COMPANY OF 1905 AND
FAY-SHOLES COMPANY,
Petitioners.

vs.

WICKOFF, SEAMANS & BENEDICT,
Respondents.

No. 445

BRIEF FOR PETITIONERS ON APPLICATION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

HOWE SCALE COMPANY OF 1886 AND FAY-SHOLES COMPANY,
Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Respondent.

BRIEF FOR PETITIONERS.

This is a petition for a writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to this court for its review and determination the case of *Wyckoff, Seamans & Benedict, Complainant-Appellee* v. *Howe Scale Company of 1886, Defendant-Appellant.*

The said suit was brought in the United States Circuit Court for the District of Vermont for alleged infringement of complainant's registered trade-marks "Remington" and "Remington Standard," and for alleged unfair competition in trade.

The Howe Scale Company of 1886 at the time of the bringing of said suit was placing upon the market typewriting machines manufactured by the Remington-Sholes Company of Chicago, Illinois, and bearing the name

"Rem-Sho" and the name and address of the manufacturer, viz., "Remington-Sholes Company, Mfrs. Chicago," and it was against this use of the names "Rem-Sho" and "Remington-Sholes" that the complaint was particularly directed. The Circuit Court sustained the bill of complaint so far as granting the prayer for an injunction, but denied the prayer for an accounting. On appeal, the Circuit Court of Appeals, by a divided court, technically reversed the decision and remanded the cause to the lower court with instructions to decree in favor of Complainant only as to the name "Remington." From this decision of the Circuit Court of Appeals, WALLACE, J., dissented, holding that the decree of the lower court should be reversed with instructions to dismiss the bill of complaint. After the issuance of the mandate of said Circuit Court of Appeals, the Circuit Court on June 23rd, A. D. 1903, entered a final decree in which it was decreed *inter alia* that your petitioner, the Howe Scale Company of 1886, and all others acting in privity with it, should be enjoined from in any manner whatsoever making use of the word "Remington" as the whole or as a part of any name or designation whatsoever which should be marked upon or applied to typewriting machines, and that the respondent, Wyckoff, Seamans & Benedict, recover the costs of suit.

Facts.

In the year 1873 E. Remington & Sons, a corporation then engaged in business at Ilion, New York, began the manufacture of a typewriting machine, the most important features of which were invented and patented by one Christopher Latham Sholes (R. 208). At that time, as complainant's witnesses testified, "the name Reming-

ton was known the world over owing to their building guns for foreign governments, building sewing machines and having one of the largest manufacturing works in the world "(R. 206). The typewriting machine manufactured by E. Remington & Sons soon became widely known, as the bill of complaint asserts, by the names "Remington" and "Remington Standard."

On March 22, 1886, the typewriter branch of the Remington corporation was sold to Wyckoff, Seamans & Benedict, and, at the time of such sale, the Remington corporation reserved to itself the right to re-engage in the manufacture and sale of typewriting machines at any time after ten years from the date of such sale.

The fire-arms branch of the Remington corporation was later transferred to the Remington Arms Company that continues to manufacture the "Remington Rifle," the "Remington Shot Gun," the "Remington Bicycle," etc.

Identifying Marks of Complainant's Machine.—For many years past complainant's typewriting machines have been marked conspicuously and invariably with the name "REMINGTON," with the large "RED SEAL" trade-mark upon the paper table and frame, with the name and address "REMINGTON STANDARD TYPEWRITER MANUFACTURED BY WYCKOFF, SEAMANS & BENEDICT, ILION, N. Y., U. S. A." on the cross-bar in front of the keyboard and with the words and figures "No. 6 REMINGTON STANDARD TYPEWRITER No. 6" on the front of the base, and with the words "This machine is protected by 67 American and foreign patents" on the back. (R. 103; 104.)

Genesis of the Remington-Sholes Company. —In 1892 Zalmon G. Sholes, a son of Christopher Latham Sholes (the pioneer typewriter inventor) invented a typewriting machine, but, being without capital, he sought to interest others in its manufacture. In the early part of 1893, The Z. G. Sholes Company was organized under the laws of Wisconsin for this purpose by persons strangers to this litigation and to those connected therewith. (R. 398.) THE STOCK OF SUCH COMPANY WAS NEVER ISSUED, AND NO MACHINE WAS EVER MADE, OR SOLD BY IT. (R. 399.*) After various failures to secure capital, Mr. Sholes, in the summer of 1893, met Franklin and Carver Remington (R. 403), sons of Samuel Remington, formerly president of the E. Remington & Sons corporation, and interested them in his new machine. They bought a three-fourths interest in Sholes' inventions from parties to whom he had previously sold, and in order to extinguish the exclusive license to practice said inventions theretofore vested in the Z. G. Sholes Company they bought a like interest in the stock of said company, making a written agreement with Sholes (R. 826) that *"no other, further or different business of any kind or nature shall be transacted by said corporation or in its behalf except that the same shall be dissolved,"* etc. Upon acquiring their interest in the Sholes machine, the Remingtons and Sholes endeavored to procure the capital necessary for its manufacture. (R. 403 and 404.)

At the outset both of the Remingtons gave equal at-

*This court will therefore perceive the error of fact in the opinion of Wheeler, J., in stating that the Z. G. Sholes Company was an Illinois corporation, that the name of such corporation was changed to Remington-Sholes Typewriter Company and the somewhat similar error appearing in the opinion of the Circuit Court of Appeals.

tention to the matter, but after the first month Franklin Remington gave his entire time to the promotion of the enterprise (R. 428), and no steps were thereafter taken by Sholes in connection with the machine without consulting with Franklin Remington. (R. 429.) It was Franklin Remington who supplied the money for salaries, for attorneys' fees, for shop rent, for changes in the machine, etc., to the extent of some six or seven thousand dollars beyond his original investment of eight or nine thousand. (R. 413, 430.) After they had labored together for many months, Sholes, without the knowledge of the Remingtons, changed the name of the reconstructed machine from "The Z. G. Sholes" to "The Remington-Sholes." (R. 427.)

As the successful manufacture and sale of their typewriting machine required capital far beyond their slender means, the Remingtons and Sholes sought at various points to enlist others in the enterprise. After repeated failures they at length induced Mr. Charles N. Fay and Mr. Franklin H. Head of Chicago to furnish the requisite funds to manufacture this new-born Remington-Sholes machine. Of the many typewriting machines upon the market nearly every one bears the name of the inventor or manufacturer, and is the output of a corporation similarly named. In keeping with this custom the name "Remington-Sholes" was retained for the machine, and the corporation organized in the spring of 1894 for its manufacture was designated the "Remington-Sholes Typewriter Company."

The capital stock of this company (which was afterwards increased) consisted at first of 1,500 shares of the par value of $100 each, and these shares were subscribed for as follows, viz.: Z. G. Sholes, 374 shares; F. Remington, 561 shares; C. Remington, 562 shares, and Nor-

man Hapgood, C. H. Hamill and L. Thompson, one share each. Upon the completion of its organization, the following officers were chosen, viz.: Mr. C. N. Fay, president; Mr. Franklin Head, vice-president; Mr. Franklin Remington, general manager; Mr. Z. G. Sholes, superintendent (R. 434), and Franklin Remington, Carver Remington, Z. G. Sholes and Messrs. Fay and Head, directors. (R. 409.) The company at once purchased the necessary tools and machinery, and its first typewriting machines were placed upon the market in December, 1894. *During the first year of the existence of this company its business was managed entirely by Franklin Remington and Z. G. Sholes* (R. 434; 429), Mr. Fay being absent most of the time in Europe and elsewhere.

In preparing the machine for the market, modifications and changes were made by Sholes, and these were invariably talked over with Remington and were subject to his approval. (R. 434.) From December, 1894, until it ceased doing business in the fall of 1896, the Remington-Sholes Typewriter Company widely advertised its machines as the "Remington-Sholes Typewriter" (R. 437), and established agencies throughout different parts of this country. During the first year it sold about 1,000 machines (R. 438), and up to December, 1896, about 3,000 or 3,500. (R. 438.)

In the fall of 1896 the Remington-Sholes Typewriter Company had run so in debt that it became necessary to take steps to meet its obligations, and on December 14, 1896, a meeting of the stockholders was held for such purpose. At this meeting 2,356 shares of stock were represented, Mr. Sholes, Mr. F. Remington, Mr. Fay and Mr. Head, with other stockholders, being present and voting. Resolutions were then passed, instructing the

secretary to sell at public auction the property and assets of the company, the buyer to have the privilege of using all or any part of the company's corporate name. (R. 839.) On December 19, 1896, in pursuance of such stockholders' resolutions, C. N. Fay purchased in his own name (but as trustee for himself and other stockholders) the whole of the assets of said company, together with its good-will, the exclusive right to use its trade-marks, trade-name, etc., and for several months thereafter (R. 410), and until a reorganization could be effected, carried on the business at the factory formerly occupied by said Remington-Sholes Typewriter Company. (R. 354.)

The charter of the Remington-Sholes Typewriter Company was surrendered in April, 1897. In the same month the Remington-Sholes Company was incorporated under the laws of Illinois, and purchased all the assets, good-will, trade-marks, trade-names, etc., theretofore belonging to said Fay and to said Remington-Sholes Typewriter Company. Since its organization said new company has continued at the same factory and through the same instrumentalities as before used by the old company and by Fay to manufacture and sell its typewriters.

The organization of the Remington-Sholes Company was in purpose and in effect a reorganization of the old company (R. 410; 431), the plan being to divide the common stock of the new company amongst the stockholders in keeping with the amounts of cash actually invested by them in the old company. The allotment of 150 shares of stock to Franklin Remington was admittedly in keeping with such plan, as he had invested $15,000 cash in the old company. (R. 430; 434.) Z. G. Sholes received no stock in the new company, because, by sales of his stock in the old company, he had already been re-

imbursed for his expenditures in connection with his original machine. (R. 431-432.)

Distinguishing Marks of Defendant's Machine.—Every machine put upon the market by the old Remington-Sholes Typewriter Company, and its successors, up to the middle of the year 1900 (R. 555) (nearly two years after the filing of the bill of complaint) had a highly ornamental, bronzed frame of very unique design. This frame both as to shape and coloring was a radical departure from the conventional plain black enamel frames invariably used upon complainant's and other typewriting machines. The machines made and sold by the defunct Remington-Sholes Typewriter Company were extensively advertised as the "Remington-Sholes" (R. 438), and were conspicuously marked with the words "REMINGTON-SHOLES, CHICAGO." While Mr. Fay conducted the business in his own name pending the reorganization, the same marks were retained. When the new company took possession of the plant and business, the trade-mark "REM-SHO" was adopted and from that time all of its machines have been marked also upon the cross-bars with the words "REMINGTON-SHOLES COMPANY, Mfrs., CHICAGO." The name "REM-SHO" was registered as a trade-mark October 19, 1897.

From the very beginning of its business and even before actually placing its machines upon the market, the Remington-Sholes Typewriter Company advertised conspicuously and in divers ways the fact that its machine "was not the Remington Standard Typewriter" and that it had no connection with complainant or its machine, and the salesmen and dealers were invariably instructed to guard carefully against all danger of possible confusion between the two companies and their respective machines.

(See, for example, R. 439; 1258; 306; 440; 1041; 1142; 1169; 1262; 1278; 1309; 1322; 1331.) All of the catalogues circulated by defendant (and these catalogues have been distributed broadcast throughout the country) contained in connection with the history of defendant's machine the following statement:

> "We state then emphatically that this company has no connection whatever with that well known and excellent machine, the Remington Standard Typewriter, and caution all possible customers against confusing the 'Rem-Sho' with that machine or any other."

The question raised at the threshold of this case is whether a corporation that has adopted for use as a trade-mark an ordinary personal name can prevent the use by another corporation as part of its corporate title of the same personal name.

That a personal name cannot be exclusively appropriated by anyone as against others having a right to use such name, is conclusively settled by the repeated decisions of this court.

Brown Chemical Co. v. *Myer et al.*, 139 U. S., 540.
McLean v. *Fleming*, 96 U. S., 245.
Canal Co. v. *Clark*, 13 Wall., 311.
Singer Mfg. Co. v. *June Mfg. Co.*, 163 U. S., 169.
Elgin Nat'l Watch Co. v. *Illinois Watch Case Co.* 179 U. S., 665.
Goodyear Rubber Mfg. Co. v. *Goodyear Rubber Co.*, 128 U. S., 598.

Nor is the fact that a complainant asserts an exclusive

right to a personal name, in part, at least, because of its registration as a trade-mark in the U. S. Patent Office of any moment, as the authorities are uniform in holding that registration cannot add to a complainant's right to relief nor give validity to an otherwise invalid trade-mark.

Elgin Nat'l Watch Co. v. *Illinois Watch Case Co., supra.*

Sarrazin v. *Irby Co.*, 93 Fed. Rep., 625 (C. C. A.)

In *Brown Chemical Co.* v. *Myer et al., supra*, this court, in speaking by Justice Brown, after referring to numerous cases in which a defendant had been restrained from using his own name in a fraudulent manner, said:

> "These cases obviously apply only where the defendant adds to his own name *imitation of the plaintiff's labels, boxes or packages*, and thereby the public are induced to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the *same right* to its use and enjoyment, as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damages he may do a rival in trade, than he would be for an injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own lands. These and similar instances are cases of *damnum absque injuria.*"

Inasmuch, therefore, as the personal name "Remington" was one incapable of exclusive appropriation, it follows that any one of like name has the same right to its use and enjoyment as he has to any other species of property so long as such use be exercised in a reasonable, honest and fair way. The case at bar, therefore, falls plainly within the language of this court in *Elgin National Watch Co.* v. *Illinois Watch Case Co., supra*, where it was said:

"If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade mark is not in itself a good trade mark, yet the use of the word has come to denote the particular manufacturer or vendor, **relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin.**"

Goodyear Rubber Mfg. Co. v. *Goodyear Rubber Co.*, 128 U. S., 598.

Centaur Co. v. *Marshall*, 97 Fed. Rep., 785 (C. C. A.).

Not only are the sweeping decrees rendered in the case at bar repugnant to the decisions of this court in the Singer case, the Elgin Watch Co. case, and the Goodyear case above noted, but such decrees plainly ignore also the rule there established by this court that, where a word, adopted by a plaintiff as a trade-mark, is a name incapable of exclusive appropriation, the most that can be required of a defendant is that he shall adequately inform the public that his wares are not those of plaintiff's manufacture, since such decrees have been rendered in the face of the fact that the defendant's machines were invariably marked with the manufacturer's name and address (the adequate information required by this court to be given in the Singer case), and in the face of the further fact that the defendant, by its widely distributed catalogues, call the attention of the public to the fact that it had no connection with the complainant or its machine. In the Goodyear case this court, after holding that the designa-

tion "Goodyear Rubber Co." was one incapable of exclusive appropriation, made plain its view that the issuance by a defendant of catalogues or circulars distinguishing its wares from those of the plaintiff was irreconcilable with the pretense that it was seeking to palm off its goods upon the public as those of plaintiff's. This court there said (128 U. S., 604):

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff. *McLean* v. *Fleming*, 96 U. S., 245; *Sawyer* v. *Horm*, 4 Hughes, 239; *Perry* v. *Truefitt*, 6 Beavan, 66; *Croft* v. *Day*, 7 Beavan, 84.
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> "There is no proof of any attempt of the defendant to represent the goods manufactured and sold by it as those manufactured and sold by the plaintiff; but, on the contrary, **the record shows a persistent effort on its part to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it had no connection with the plaintiff.**"

And in the Singer case this court said (163 U. S., 200):

> "This leaves only two questions, first, whether that name as used in the circulars and advertisements of the defendants is accompanied with such plain intimation as to the source of manufacture of the machines by them made as to make these circulars and advertisements lawful; and second, whether this also is the case with the use of the word 'Singer' on the machines which the defendant makes and sells. As to the first of these inquiries **the proof shows that the circulars were so drawn as to adequately indicate to any one in whose hands they may have come that the machines therein referred to were made by the June Manufac-**

turing Company, and not by the Singer Company."

The defendant in the Singer case was found guilty of unfair dealing for the reason that it had failed to mark its machines with sufficient notice of their source of manufacture—a charge that certainly cannot be imputed to the defendant in the case at bar since the inscription "Remington-Sholes Company, Mfrs. Chicago" has been invariably used upon defendant's machines.

Your Honors will notice that the decree of the Circuit Court of Appeals in this cause, in the absence of any imitation of the characteristic marks of complainant's machine and in the face of the fact that defendant's machines are distinctly marked with the manufacturer's name and address, without qualification or reservation enjoins your petitioners from the use of the personal name "Remington" in any manner whatsoever upon typewriting machines, the injunction being more particularly directed against the placing upon typewriting machines put forth by your petitioners of the inscription "Remington-Sholes Company, Mfrs. Chicago." If the giving by a person of his name to a corporation organized by him of which he is an officer, and to which his whole time, capital and energy are devoted, be a "reasonable, honest and fair exercise" of his right to use his name, then the decisions of the Circuit Court and Court of Appeals in this cause are manifestly in error and repugnant to the decisions of this court.

The history of the organization of the Remington-Sholes Typewriter Company, as briefly given in the foregoing statement of facts, must satisfy this court upon the following points:

1. It was *reasonable* that Remington and Sholes should form a corporation for the manufacture of their

typewriter (*a*) because alone they had not the capital necessary to manufacture it; (*b*) because corporate management is regarded as the most effective form of business enterprise; (*c*) because all other typewriters are made by corporations.

II. It was *reasonable* that they should adopt the name "Remington-Sholes" for their machine because both Remington and Sholes had labored incessantly for many months in the production of the machine, Sholes contributing his inventive genius and Remington, after giving up all other work, furnishing not only the funds to effect the reconstruction of the machine and its exploiting, but conferring with Sholes as to every detail of change made therein.

III. It was *reasonable* that the corporation created to make this machine should bear the names of both Remington and Sholes (*a*) because it was to manufacture a machine that was distinctly the product of and owed its existence to both; (*b*) because it is the almost universal custom in the typewriter trade to identify by the same name the corporation and the machine that it is to manufacture; (*c*) because Sholes' father having invented the pioneer typewriter, which the company whereof Remington's father was president gave to the world, the public would be interested in the coming together of these sons; (*d*) because the family name of Remington had a world-wide reputation in many lines of trade older than and distinct from the good-will of the typewriter business; (*e*) because the public is attracted by family reputation in trade as it is in the professions; (*f*) because the courts, and the public common sense, recognize the value of a father's good name and a son's right to avail himself of it; (*g*) because having a right to use their names like ordinary property they had a right to bestow such names

in the usual way upon a corporation of their own creation, in which they held a large part of the stock and to which all their time and energies were devoted.

IV. It was *reasonable* that the reorganized Remington-Sholes Company should adopt and continue to bear the name of the old company, (*a*) because it was the successor to the old company; (*b*) because by the retention of the name under which its predecessors had advertised the machine it could hope to better retain the trade; (*c*) because the highest courts of the German Empire in a suit instituted by this complainant had emphatically declared that the name "Remington-Sholes" was lawfully and properly used.

The real question is not whether Messrs. Remington and Sholes could have *abandoned* the use of their names, but whether under all circumstances the use which they made of their names was a *reasonable* and a fair one. In determining the reasonableness of the use of the name "Remington-Sholes" for a corporation designed to manufacture typewriters produced by Messrs. Remington and Sholes, regard will be had to those trade customs disclosed by the record and judicially noticeable that are plainly pertinent to the question. Thus it is but fair to notice not only that in all lines of industry the trend of modern manufacture is toward corporate management, but especially is this true of the typewriter trade. All the numerous typewriting machines now upon the market are made by corporations, and these with but very few exceptions bear the names of the inventors or the manufacturers of the machines. Thus we find the "BLICKENSDERFER," the "DENSMORE," the "HAMMOND," the "JEWETT," the "FISHER," the "ELLIOTT & HATCH," the "ODELL-YOUNG," the "OLIVER," the "SMITH," the "FOX," the

"WELLINGTON," the "YOST," and the "HALL," besides various other well known machines manufactured by corporations of like names. In giving their names to the machine and to the company organized for its manufacture, Messrs. Remington and Sholes were but following the established custom of the typewriter trade. Certainly in the light of all the facts no course could have been more *reasonable* or fair.

In their opinion the majority of the Court of Appeals assert that the incorporators of the old Remington-Sholes Typewriter Company knew "that the use of the name 'Remington' in connection with the typewriting machine would help to sell it as the name of 'Brown' and 'Peterson' would not." Possibly it would, but certainly this can not alter the fact that inasmuch as the production of the finished machine was due to the joint labors of Remington and Sholes and to the capital of the former, it was reasonable to employ both names. The family name of REMINGTON has for the past forty years held a reputation in the markets of the world different from that of "BROWN" or "PETERSON." It has stood as a synonym of good workmanship so long and in such different fields of manufacture that few if any American names show as divers and wide a reputation. In this respect it is almost unique, and many a name although of great distinction in some single line of industry seems insignificant by comparison. Had Franklin Remington embarked in the manufacture of sewing machines, or agricultural implements, or indeed of any other line of machinery, particularly if designed for international trade, the world-wide reputation of his family name would have unquestionably prompted its use. We submit, however, that it would scarcely seem reasonable that a son of Westinghouse, of Edison, of Corliss, of Carnegie, of

Bessemer or of Krupp should voluntarily conceal his identity even though a Brown or a Peterson might do so. The simple fact is that men pride themselves upon their family reputation, and, however democratic we may be, it must be admitted that we view with a deeper interest the son of such a distinguished father and look to find in him a measure of inherited skill.

The courts have repeatedly recognized the fact that the value attaching to the good reputation of a man's name is a most appropriate reason for its use by his son when engaging in business; and, where such reason exists, the leading cases have allowed such name to be prominently used by his son when associating himself with others, although a degree of confusion in trade has arisen that would have been avoided had the name selected for the firm been that of one or more of his associates. Thus, in the case of *Meneely* v. *Meneely*, 1 Hun., 367, which has been repeatedly cited with approval by this court (*McLean* v. *Fleming*, *supra*; *Singer Mfg. Co.* v. *June Mfg. Co.*, *supra*), and by the Federal and State Courts generally, it was said:

> "In the case at bar, the defendants have not used the firm name of the plaintiff, or any name by which it has been heretofore known or designated, but the name of 'Meneely & Kimberly' as constituting a co-partnership, while engaged in the same business as the plaintiffs have, for a long time, carried on. The objection is to the employment of the name of 'Meneely' in connection with the same business as the plaintiffs, at the place where the defendants are located, which is in the city of Troy on the opposite side of the Hudson River from where plaintiffs are situated. . . .
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> "The question then arises, whether the defendants are liable to be enjoined without having done any wrongful act and merely because they assumed to use the name of one of them in connection with a

business in which the ancestor of that defendant and of the plaintiffs had been engaged, and which by a life of industry and toil, and by skill he had made profitable, and an invaluable inheritance for his posterity. **The right to the enjoyment of a good name, personally or in connection with a business established by the labor and integrity of an ancestor is an inestimable privilege which cannot be too highly prized. As a general rule, every individual is entitled to the full benefits and advantages which such a privilege confers and should not be deprived of the same by the interference of the courts except in extraordinary cases and for the most cogent of reasons.** . . . . The defendant Clinton H. Meneely claimed the right to profit from the name which he inherited, and the good reputation which his father had earned in the business of bell founding. He was open and above board in declaring thus to derive advantage, and formed a partnership and conducted his business with the expectation and belief that profit would accrue to him by reason of the good name and celebrity which had attended his father's successful career. I am inclined to think that in this respect he committed no wrong, and that he has a perfect right to use his own name in his own business even although that name was the same as the one used by the plaintiffs and the business precisely of the same character."

. . . . . .

"There is quite a distinction between appropriating the good will of the business of a deceased father carried on at a particular locality and enjoying the benefit of his name as a man of skill and fair dealing in the business in which he was engaged."

And upon the appeal of the Meneely case (reported in 62 N. Y., 427) the decision of the General Term of the Supreme Court was affirmed, the court saying:

"The bare statement of the scope of the injunction would seem to be sufficient to show that it ought

not to have been granted and that the judgment awarding it was erroneous. The cases referred to in its support fall far short of sustaining it. If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs and thus enticing away the plaintiff's trade, or resorted to any artifices to induce the belief that the establishment of the defendants was the same as that of the plaintiffs, and, perhaps, if without any fraudulent intent they had done acts calculated to mislead the public as to the identity of the establishments and produce injury to the plaintiffs beyond that which resulted from the similarity of names, then the cases referred to sustain the proposition, not that a court of equity would absolutely restrain the defendant Meneely from the use of his own name in any way or form, but simply that the court would enjoin him from using it in such a way as to deceive the public and injure the plaintiffs. **The manner of using the name is all that would be enjoined, not the simple use of it;** for every man has the absolute right to use his own name in his own business, even though he may thereby injure the business of another person bearing the same name, provided he does not resort to any artifices or contrivance for the purpose of producing the impression that the establishments are identical, or does anything calculated to mislead. **Where the only confusion created is that which results from the similarity of the names the court will not interfere.** A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business."

Again, in *National Starch Mfg. Co.* v. *Duryea et al.*, 79 Fed. Rep., 651, the Circuit Court of Appeals for the Second Circuit had before it a case, the facts of which were very like to those of the case at bar. In that case

Hiram Duryea and his brothers had been controlling members of the Glen Cove Manufacturing Company, which had made a wide reputation for starch enclosed in packages labeled "DURYEA STARCH," and bearing a picture of the factory and the name of the company. At the time complainant bought the business, Hiram Duryea agreed not to engage in the manufacture of starch for a period of five years. After the lapse of such time and in 1895, two sons of Hiram Duryea, having no business or reputation, formed a partnership with two former salesmen of the Glen Cove Company and of complainant, and entitled their firm "Duryea & Co.," the capital of the firm being furnished entirely by Hiram Duryea. Duryea & Company caused their starch to be manufactured for them by another company, and it was placed upon the market in packages on which were prominently displayed the words "LAUNDRY STARCH, PREPARED BY DURYEA & CO." and "PURE CORN FLOUR, PREPARED BY DURYEA & CO."

In that case, as in the case at bar, it was alleged that the defendants had made an "unnecessary" and unfair use of the name Duryea, since the firm could have used equally as well the names of the two salesmen who, with the Duryea brothers, comprised it. At Circuit the court found for complainant upon this point on a motion for preliminary injunction, but upon appeal from such decision it was held (79 Fed. Rep., 651) that defendants had not made an unfair, unreasonable or unnecessary use of the name Duryea. The court (Wallace, Lacombe and Shipman, Circuit Judges, and Brown, District Judge) there said:

> "Inasmuch as the defendants have not called their starch by this well-known name, and have not assimilated the labels upon their packages to those

long used by the manufacturers at Glen Cove, the question is whether the defendants have made such an unnecessary and unfair use of the name of 'Duryea' as to deserve the unfavorable criticism of a court of equity. In the recent case of *Singer Manuf'g Co.* v. *June Manuf'g Co.*, 163 U. S., 169, 16 Sup. Ct., 1002, it is declared by the Supreme Court to be a well-settled doctrine that: 'Every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. . .

"If the new firm could properly adopt the name of 'Duryea & Co.' and if sufficient precaution were taken to show the public that the manufacture is not that of the successor of the Glen Cove Manufacturing Company, the complainant is not entitled to an injunction. **The firm consisted of four persons, two of whom were named 'Duryea,' and all of whom were without capital, which was furnished by the father of the two Duryeas, and who had now a right to permit his name to be used honestly in the starch business. Under this state of facts the firm was not dealing unfairly with the complainant in calling itself 'Duryea & Co.,' and in omitting to add the name of the former salesmen of the complainant.**

"Upon the second point, whereas the complainant uses the name 'Duryea Starch' and the picture of the Glen Cove factories, and said that it was the manufacturer, the defendants' packages simply assert that the starch which they contain is prepared by Duryea & Co. **We think that this is a sufficient declaration of the source of the manufacture, as distinguished from the well-known source at Glen Cove,** and that the labels are not objectionable, because, by reason of their marked dissimilarity from the complainant's labels, the public could not be misled."

When the Duryea case again came before this Court of Appeals upon the final hearing (101 Fed. Rep., 117), it was said:

> "There is now evidence that the defendant's starch was vigorously pushed upon retail grocers by salesmen whom the purchasers formerly knew as salesmen of the complainant's product, and that grocers made representations, either by acts or orally, to their customers, in regard to the origin of the new product, which indicated either careless ignorance or a willful disregard of the truth. Testimony is given by retail purchasers from the grocers that they were misled by the use of the name Duryea & Co. . . .
>
> "That an incidental interference with and injury to the business of the complainant, which had the exclusive right to the use of the well-known name or title 'Duryea's Starch,' would occur—an injury which would be enhanced by the earnestness of competition in the field which the complainant and its predecessors had labored to occupy—and that injury from honest competition is not remediable by a court of equity, are also manifest. The point which is urged by the complainant is that the defendants use the name of Duryea, and have pressed the article which they sell upon the public by the use of that name 'unaccompanied with any precaution or indication' that the article was not the manufacture of the complainant, and thus that their silence is an artifice which misleads (*Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118); and that neither the original members of the firm nor Hiram Duryea have taken pains to differentiate their goods from those of the complainant. The complainant uses the familiar label, which contained a picture of the factory buildings at Glen Cove, with its name as the manufacturer of the starch in lieu of the name of its predecessor, and with the words 'Duryea's Starch.' The defendant's label is entirely dissimilar, **but it contains the words 'Prepared by Duryea & Co.'**

> "That they gladly welcomed the pecuniary advantage from the right to use the name Duryea is true, but that they presented it to the public as the Glen Cove starch is not true, and, while their label does not say as much as it might have said without detriment to themselves, and with the same injury to the complainant, **yet we think that their starch is shown by the label not to be the manufacture of the complainant,** as the successor of the Glen Cove Company, and not to be identified with the former Glen Cove factories as the source of its manufacture."

Plainly this decision of the Circuit Court of Appeals for the Second Circuit in the Duryea case is in direct conflict with its decision in the case at bar.

Corporation's right to use a surname. While the decisions made in the case at bar, affirm the broad proposition so fully established by the authorities that an exclusive right can not exist to the use of a family name, they hold that the use of such a name by a corporation stands upon a different footing. The basis of such ruling is that a corporation, being an artificial body, its organizers have the whole vocabulary to select from, and hence are in duty bound to avoid the selection of such a name as may in any manner interfere with the business of those using like names.

The answer to all of this is that the law as established by the decisions of this court recognizes the right of every man to use his name *reasonably and honestly in every way*, whether such use be effected by him alone or associated with others, either in a firm or corporation; and, on the other hand, it condemns a dishonest use wherever and however practiced.

Inasmuch as the courts have thus invariably recognized the right of a person to use his family name fairly in

the business of a firm in which he is honestly engaged, we submit that in reason no distinction can be made between the use of such name in a firm and its use in a corporation, for in both cases the names adopted are alike selected and artificial.

A corporation is in effect but a partnership, and the court will take judicial notice of the fact that of late years it has become a common practice to adopt family names for corporations in precisely the same manner as such names are used for firms; witness, for example, complainant's name, Wyckoff, Seamans & Benedict, and the corporate name, E. Remington & Sons. Indeed, if a common usage can prove the reasonableness of the adoption of a personal name for a corporation, the court need but notice the fact appearing from this record that nearly all typewriting machines on the market to-day are manufactured by corporations employing such personal names.

Manifestly, when one incorporator has an unrestricted legal, moral and commercial right to the use of a family name that has acquired a world-wide reputation for honesty and good workmanship, he can contribute to corporate advancement and prosperity by allowing a company to use his name (where, as in the case at bar, he holds a substantial interest in and is an important member of such corporation, and is devoting his entire time to the management thereof) in the same way and for precisely the same reason that he could use such name in connection with a partnership business.

Certainly it would be absurd to contend that Messrs. Remington and Sholes were not at liberty to engage in the typewriter business under the firm name of "Remington & Sholes," or associating others with them under the firm name of "Remington, Sholes & Company," and yet if such use of these names be reasonable and permissible

it is difficult to perceive why they might not proceed with equal reason and fairness to follow the accepted custom of giving their names to a corporation organized and managed by them. As was said by the Court of Appeals for the Second Circuit in the recent case of *Baker* v. *Baker,* 155 Fed. Rep., 297 (300):

> "As regards the complainant, it is wholly immaterial whether the business is conducted as that of a corporation or that of an individual by the same designation."

In *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 32 Fed. Rep., 94, the learned Justice Bradley said:

> "The fact that both are corporate names is of no consequence in this connection. They are the names by which the parties are known, and are to be dealt with **precisely as if they were the names of private firms or partnerships.** The defendant's name was of its own choosing, and if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company."

If a man's use of his name is to be held so limited that he can not employ it in the ordinary way and for a recognized and legitimate purpose in trade, then is set at naught the language of this court in *Brown Chemical Co.* v. *Meyer, supra,* that "a man's name is his own property and he has the SAME right to its use and employment as he has to any other species of property."

In *Industrial Mutual Deposit Co.* v. *Central Mutual Deposit Co.*, 66 S. W., 1032, the Court of Appeals of Kentucky in refusing to enjoin defendant against the use of its corporate name, said:

> "Thus, in Elliott on Private Corporations (section 48) it is said: 'The rule most consistent with principle is that a corporation will be protected in the use of its name upon the same equitable principles

which protect persons in the use of trading names and trade-marks.' There is, however, one well recognized exception to the rule, and this is that a trade-name consisting simply of a generic term will not be protected."

In *Monarch* v. *Rosenfeld et al.*, 39 Southwestern Rep., 236, the following pertinent language was used:

"Now, it is argued that the court by its judgment limits S. I. Monarch to the use of his name in business alone or as a partner, but as a stockholder in the corporation he can not use his name in the corporate business, its property is in no sense his property, its business is not his. *I do not think that is the meaning of the judgment or opinion.* . . . It is conceded that he can in good faith form a partnership with Rosenfeld & Hirsch in the whiskey business and the firm might use his name. **If the firm can, in the light of the opinion, there is no reason why his name cannot be used in the corporation. . . . Plaintiff can be injured no more in his business by a corporation than he can by such a firm. . . .**

"So, the only question is, if S. I. Monarch can go into business in good faith with any corporation, and use his name in branding its barrels with his name, he can do it with the defendant. In 1 Mor. Priv. Corp. (2nd Ed.) Sect. 1, it is said: 'However, it is essential to a clear understanding of many important branches of the law of corporations to bear in mind distinctly that the existence of a corporation independent of its shareholders is a fiction, and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.' I do not doubt but that in certain kinds of corporations a stockholder can authorize the corporation to use his name, and for some purposes its business is his business. **It is known to all—the knowledge is so universal that I think the court can take notice of it—that in these days the practice and custom has grown up among business men that when two or three associate themselves**

together for the purpose of engaging in any trade or business of any magnitude, instead of forming a partnership to conduct and carry on said business, they form a corporation; they invest in it all of their capital, give to it all of their time and attention. In reality, it is their business. But for fiction of law, such an association would be a partnership. If the Court of Appeals meant to say that S. I. Monarch could not use his name in such a corporation, he has, after all, but a limited right to use his name in business. I do not think such is the meaning of the court."

In *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 Fed. Rep., 903 (affirmed by C. C. A., 76 Fed. Rep., 372) Showalter, C. J., said:

"An injunction was prayed to stop the use by defendant of the name Pettijohn in defendant's corporate name and in the designation of defendant's product, and to stop the use by defendant of the wrapper or any wrapper showing the name Pettijohn. . . . It can hardly be contended that he (Eli Pettijohn) had not then the right to make, or rather to continue to make rolled wheat and to market the same in packages bearing his name in any part of the United States. Neither complainant nor its assigns could by advertising the name Pettijohn prevent Eli Pettijohn from doing this. **It would seem to follow also that he might secure the co-operation of others willing to assist him financially in the business, and that he might with such co-operation form a corporation for the purpose of carrying on such business;** *provided always he should take reasonable precautions to distinguish the business thus carried on by him from that of a competitor rightfully using the name Pettijohn*".

In *Hazelton Boiler Co.* v. *Hazelton Tripod Boiler Co.*, 142 Ill. Sup., 494, the court recognized the right of Hazelton to give his name to the defendant corporation, and in so doing said:

> "If any confusion has occurred it has arisen from the similarity of the corporate names, and not from any attempts on the part of the defendants to deceive. . . . If injury results to the complainant from such cause, it is *damnum absque injuria.*" (P. 509.)

In *Scott Stamp & Coin Co., Limited,* v. *J. W. Scott Co., Limited,* 15 N. Y. S., 325, the facts were as follows: J. W. Scott had been a most prominent dealer in stamps, coins, etc., when by a written contract he assigned to another, and the business was continued for some time under the name "Scott & Co." or "J. W. Scott & Co." By agreement, complainant corporation was organized and defendant took stock therein in part payment. The contract provided that Scott should not engage in the same business for two years, nor while he held stock in the complainant corporation. About three years after the date of the contract, Scott having sold his stock, again engaged in business under the name "J. W. Scott Co., Limited." The court, after a careful review of the authorities, found that defendant had a full right to use its name, and in this connection said:

> **"Inasmuch, therefore, as J. W. Scott, after the lapse of two years, had the right to engage in a similar business under his own name, he had a right to give his name to the defendant corporation,** and the mere fact that mistakes are made by customers, and that confusion arises, does not give to the plaintiff any right to an injunction. *Employers' Etc., Corp.* v. *Employers' Etc., Ins. Co.,* 10 N. Y. Supp., 845; *Blakslee Manuf'g Co.* v. *Blakslee's Sons Iron-Works,* decided July 23, 1887. The opinion of Barrett, J., in the case last referred to, makes this so clear that it is not necessary to do more than reiterate his language, which is directly applicable here. He says: 'I see no reason to believe that Mr. E. G. Blakslee, in forming the defendant corporation, sought to deceive the public, or

to wrong the plaintiffs. The intention has been legitimate, namely, to disclose the truth, and not to conceal it. Mr. Blakslee had a perfect right to let the public know that, although his name was being used as part of plaintiff's corporate title, he had no connection with the plaintiff. He and his sons had also a right to transact lawful business under their own names, so put forward as to indicate the simple truth and not to deceive any one. . . . **If the sons, with their father, could do business lawfully under the defendant's name, there is no good reason why that same name given to a corporation should be unlawful. It is still their own name applied as the law permits, and, so long as there is no deceit or fraud, they cannot be restrained from transacting, in what is substantially their own names, their lawful business.'** The case of *Holmes* v. *Manufacturing Co.*, 37 Conn., 278, is no authority to the contrary." (Pp. 326-327.)

In *Employers' Etc. Co.* v. *Employers' Etc. Co.*, 10 N. Y. S., 845, it was said:

> "There is no difference in principle between the use of an individual or copartnership name and that of a corporate name."

In *Continental Ins. Co.* v. *Continental Ass'n.*, 96 Fed., 846 (affirmed by C. C. A., 101 Fed., 255), the court said:

> "Counsel for complainant contends that it would have been a simple and easy matter for the incorporators of the defendant company to have selected a distinguishing name for it without having chosen a term already appropriated by a corporation engaged in a like business. This is true, and it is also true that the defendant might not suffer any serious pecuniary loss by the granting of the injunction prayed for in this cause; yet it is the opinion of the court that the incorporators of complainant by appropriating a generic term, purely descriptive, and in general and prevalent use, and in failing either to fix upon

an arbitrary term, or to draw upon the realms of fancy for a name, or to select one indicative of the origin or ownership of the business about to be launched, failed to vest complainant with a distinguishing appellation, the exclusive right to the use of which the courts could declare to be in complainant."

Meriden Co. v. *Parker*, 39 Conn., 450.

S. Chivers & Sons v. *S. Chivers & Co., Ld.*, 25 Trade-Mark Rec., 289.

In *Columbia Mill Co.* v. *Alcorn*, 150 U. S., 460, this court, after reviewing various cases in which it was held that geographical and like terms could not be exclusively appropriated, recognized that the same principles of law govern the use of both geographical and family names. When, therefore, the Supreme Court, in *Goodyear Co.* v. *Goodyear Rubber Co., supra*, held that the name "Goodyear Rubber Co." was incapable of exclusive appropriation, the fact that the name was descriptive of an article instead of being descriptive of a class or family took nothing from the force or application of the rule. And when the court there said "nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name," it made plain its view that a corporation had no greater right than an individual to usurp a descriptive name. The reason, quoted by this court from the leading case of *Canal Co.* v. *Clark*, viz., "it would greatly embarrass trade and secure exclusive rights to individuals in that which is the common right of many," applies as fully to family names as to others in which many enjoy a common right. This Goodyear Company case is the leading case in which this court has had occasion to pass upon the attempt of one corporation to enjoin another from using in its corporate title a name to

which others had a common right, and the unmistakable language in which it condemns such attempt should leave little doubt in the minds of any one as to the disposition that should be made of a case like that at bar, where a corporation is seeking to monopolize the use of a family name.

It is true that in some cases the courts in condemning the unreasonable use of a name have emphasized the fact that such use was "unnecessary;" but, strictly speaking, the *necessity* for the use of a name as a test of the right to its use is without warrant in the decisions of this court or in common sense. The fact that a man may always readily conceal his identity under a corporate or a firm name proves the lack of *necessity* for such use in any case. The law simply requires that he shall enjoy the right to the use of his name as he would enjoy any other species of property—in a fair and reasonable manner. He is no more expected to abandon such use or to unreasonably restrict it than he would be expected to abandon the use of his chimney (in the illustration used by Justice Brown) and run a stovepipe through another part of his house merely because the smoke of his chimney was offensive to his neighbor.

It is undoubtedly true that in a number of cases that have come before the State and Federal Courts, a distinction has been made between the use of a personal name by an individual and the use of a like name for a corporation. In such of these cases as presented facts showing that the defendants there were by their conduct estopped to bestow their names upon corporations, the decisions were presumably correct; but your Honors will observe that in the case at bar, it has never been contended that either Franklin Remington or Mr. Sholes ever committed any acts or ever bore any such relations to complainant

as to diminish in any manner their natural right to use their names in every legitimate way in business.

The opinion of Judge Coxe in this cause is based solely upon the case of *Rogers* v. *Rogers*, 70 Fed. Rep., 1017, but a reference to the opinion rendered in that Rogers case shows that the man Rogers from whom the defendant corporation derived its name, "sold his name as a decoy or permitted his name to be used for hire to deceive the public." In the case at bar there is not one iota of proof that Franklin Remington ever received any compensation whatever for the use of his name.

Our contention is that the giving of their names to the old Remington-Sholes Typewriter Company was a fair, reasonable and legitimate use of such names under the circumstances of this case. We submit that such authorities as deny an individual's right to confer his personal name upon a corporation organized by him and to which his time, capital and energy are devoted, are in plain violation of the decisions of this court and particularly repugnant to its decision in the case of *Goodyear Rubber Mfg. Co.* v. *Goodyear Rubber Co.*, *supra*, and are opposed to the various leading State and Federal cases to which we have already directed attention.

If the decisions of the Circuit Court of Appeals and of the lower court in this cause are correct and a corporation organized by a Remington and a Sholes can not mark the name "Remington-Sholes Company" upon its typewriting machines, it follows that no other corporation bearing the name "Remington" could employ its name in connection with the manufacture of typewriting machines. The record discloses the fact that there are a number of manufacturing corporations throughout the country bearing the name "Remington"—as for example, the Remington & Sherman Company of Philadelphia, the Reming-

ton Machine Works of Wilmington, the Remington Arms Company of Ilion, and yet under the decisions rendered in this case, not one of these corporations has a right, in case it should see fit to manufacture typewriting machines, to mark its corporate name thereon.

Your Honors will take judicial notice of the fact that at the present time a vast number of corporations bear personal names and this lack of harmony of the decisions renders it of the utmost importance that the law should be settled by an expression of this court. That such lack of harmony exists is generally recognized and in the recent work of Mr. Hopkins on the law of unfair trade it is said with respect to corporate names that "upon this subject the courts are hopelessly confused in their phraseology." (Hopkins on Unfair Trade, p. 110.)

In such construction that author also uses the following pertinent language (p. 112):

> "It is a self-evident proposition that a generic word embodied in a corporate name is not entitled to protection in equity." (Citing *Goodyear Co.* v. *Goodyear Co. supra.*)

Continuing, the author says (p. 113):

> "In conclusion, there is no practical difference, so far as equitable rights and remedies are concerned, between corporate names and the name of a copartnership or an individual."

German Litigation. The record in this cause shows that the typewriting machines of complainant, as well as those bearing the name "Rem-Sho" and the words "Remingtor-Sholes Company, Mfrs. Chicago" have a world-wide market, and while the issues in this cause

are by the bill of complaint specifically limited to acts within the United States, this court will perceive not only how the foreign trade but also how the impending foreign litigation must be affected by the final decision herein.

No litigation was brought by complainant against defendant or its principal until the filing of this suit, more than four years after the protest of June, 1894. But while the machine manufactured by the old Remington-Sholes Typewriter Company and marked with the words "Remington-Sholes, Chicago" were being sold in Germany by one Henry Newald, a suit was brought there against him by complainant's agents, Glogowski & Co., by whom the name "Remington" had been registered in the German Patent Office as a trade-mark for typewriter machines. *The case went from the lower courts to the German Imperial Supreme Court and it was there held that in view of the history of the Remington-Sholes Typewriter Company the name "Remington-Sholes" could be properly and lawfully used upon machines of its manufacture.* (R. 29 and 1433.)

As these German decisions could not under the rulings of our courts be set up in support of a plea of *res adjudicata* they were not formally offered in evidence, but notice was given upon the record (R. 1433) that at the hearing of the cause they would be referred to, and counsel for complainant was furnished at that time with copies of the decisions and with translations thereof. For the convenience of the court this petition is accompanied by a translation of these decisions (Exhibit A), the correctness of which translation has never been questioned. A consideration of these will show that the history of complainant and of the Remington-Sholes Typewriter Company was set forth before the German courts, and it was strenuously urged by the German representatives of com-

plainant that the name "Remington-Sholes" was adopted for the fraudulent purpose of deceiving the public, and should be enjoined.

In the decision of the Kammergericht, promulgated October the 15th, 1897, the following pertinent language appears:

> "Accordingly, the defendant, who in this locality sells the typewriters of the Remington-Sholes Typewriter Co. of Chicago, cannot be prohibited from affixing said business name upon the goods of said house nor from using it in the course of business, or announcements, advertisements, etc. It is not open to dispute, that the defendant deals only in typewriters made by said concern, and that he actually obtains his goods from said concern.
>
> "The plaintiffs have tried to establish that the Remington-Sholes Typewriter Co. has unlawfully and sneakingly appropriated the word Remington. They do not dispute that two descendants of the typewriter manufacturer Remington, Franklin and Carver Remington, were among the founders of the concern and are still interested in the same; but again they claim that Franklin and Carver Remington entered into said concern only *pro forma*, to bestow upon it an apparent right to use their name so well known in this line of business. However, whatever the plaintiffs have actually shown by way of foundation to their opposition to the use of the name Remington can in no wise give rise to the conclusion, that in this instance a business name has been sneakingly appropriated. The plaintiffs have confined themselves to the following statement: Franklin and Carver Remington are the sons of Samuel Remington, one of the copartners of the old firm of Remington & Sons; neither of them have ever had anything to do with the running of the business of said firm, or, before entering into the present business under the name of Remington-Sholes Typewriter Co. ever occupied himself with the manufacture of typewriters. But even if both these points had been fully established, it would not

result therefrom, that the two Remingtons would not become real associates in said new house and were only *pro forma* engaged by said house, that their name might be used for improper purposes. **For it is quite possible, yea, even probable, that they should have seriously devoted themselves to the business of their father, and acquired special knowledge, in which they were formerly lacking. To choose this business, in order to take advantage of the reputation attached to their name in this line of business, they have a perfect and indisputable right."**

Upon a revision or rehearing of the German case, the Reichsgericht (Imperial Supreme Court), by a decision published October 22, 1899, refused to reverse the decision of the Kammergericht.

That these decisions of the German courts, although not of controlling force should be recognized as precedents, is fully established by the authorities.

Liebig Extract of Meat Co. v. *Libby, McNeill & Libby,* 103 Fed. Rep., 87 (89), (C. C. A.).

Centaur Co. v. *Heinsfurter,* 84 Fed. Rep., 955 (C. C. A.).

Singer Mfg. Co. v. *June Mfg. Co.,* 163 U. S., 169.

The pendency of the suit brought by complainant against the Fay-Sholes Company in the United States Circuit Court for the Northern District of Illinois and the order of that court making the determination of such suit dependent upon the determination of this cause, presents a further reason why the present petition should be granted. So also, the failure of the Court of Appeals to pass upon the error of the lower court in admitting the

vast amount of testimony introduced by complainant as to foreign acts, advertisements and other irrelevant matters, and to tax complainant with the costs thereof has imposed upon the petitioners herein a burden of costs from which they are clearly entitled to be relieved.

The statement in the opinion of the Circuit Court of Appeals that it does "not find in this voluminous record sufficient evidence that defendant (by which name the Remington-Sholes Company is specifically designated) has itself done anything to promote confusion in the minds of the public, except to use the name Remington on its machine and in its literature" renders unnecessary a discussion of the vast amount of testimony with respect to the acts and advertisements of foreign and independent dealers that was brought into this case against defendant's protest; although this finding of the Court of Appeals plainly shows its error in failing to tax the cost of such testimony against complainant. If opportunity is afforded we stand ready to satisfy this court that complainant's voluminous record is not only devoid of a single instance of actual deception of the public, but that it shows merely an insignificant number of instances of mistakes upon the part of the public that under the findings of the courts in this cause have inflicted no damage upon complainant. We are prepared further to show this court that the whole history of defendant's principal is marked not merely by the absence of any fraudulent intent to trespass upon complainant's good-will, but by a distinct endeavor in every conceivable way—by the dress of its machine, by its signs and circulars, by its instructions to salesmen, agents and dealers—to prevent even the possibility of confusion in the public mind. The stigma of fraud placed upon these petitioners by the final

decree of the lower court is one which we conceive should be wiped out by the correction of such decree.

In conclusion we submit that in view of the novel question presented in this case and upon all the facts thereof, this petition for a writ of *certiorari* should be granted.

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